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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1278 and 1279

JOHN B. WOOTTEN; AND JOHN B. WOOTTEN, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF R. K. WOOTTEN, DECEASED, *Petitioner,*

vs.

CARL EKLUND WOOTTEN, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND VENDLA E. WOOTTEN;

AND

JOHN B. WOOTTEN; AND JOHN B. WOOTTEN, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF R. K. WOOTTEN, DECEASED, *Petitioner,*

vs.

VENDLA E. WOOTTEN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Judgment Below

Petitioner prays that writs of certiorari issue to review the final judgments of the United States Circuit Court of Appeals for the Tenth Circuit entered on the 25th day of

January, 1947, (R. 2[1] at 328), reversing the judgments of the United States District Court for the District of New Mexico entered on the 5th day of February, 1946, (R. 2 at 63 and 308) which involve the judgments of said United States Circuit Court of Appeals entered on the 27th day of August, 1945, (R. 1 at 73 and 74), reversing on the first appeal the judgments of said United States District Court entered on the 18th day of December, 1944, (R. 1 at 35 and 57), said last mentioned judgments of the Circuit Court of Appeals having declared the law of the cases for said Circuit Court of Appeals and said District Court.

Basis of Jurisdiction

1. Jurisdiction is invoked under Section 240 (a) as amended by Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. 347).

2. The date of the final judgment of the Circuit Court of Appeals for the Tenth Circuit was January 25, 1947.

3. The Circuit Court of Appeals of the Tenth Circuit in the above styled causes has rendered decisions in conflict as to the same matter with decisions of the Circuit Court of Appeals of the First Circuit in *Donnelly* v. *Consolidated Investment Trust, et al.*, 99 F. (2d) 185, and also in conflict as to the same matter with the Circuit Court of Appeals of the Sixth Circuit, as announced in *Prudential Ins. Co. of America* v. *Liberdar Holding Corporation*, 72 F. (2d) 395 (2nd Circuit).

4. The decisions of the Circuit Court of Appeals in the instant causes are of great public importance involving, as they do, the rights, duties and obligations of trustees and of the individual acting as trustee, in the matter of invest-

[1] There being two transcripts of record in the Circuit Court of Appeals, they are referred to herein as R. 2, the latest, and R. 1, the first.

ment of his individual funds in property, corporate stock, not a part of the trust *res;* and involving also the extent of control of the discretion granted by a trustor to the trustee by the *cestui* and the courts.

Questions Presented

The questions presented by this petition are:

1. Whether a beneficiary of a trust estate composed in part of corporate stock, a portion of which stock is owned by the trustee individually and a part by the beneficiary but held by the trustee, can object to the purchase on the open market by a trustee individually of stock in the same corporation.

2. Whether a trustee individually owning stock in a corporation and holding stock in the same corporation for his *cestuis,* and having the widest possible discretion in the matter of investment of the funds belonging to his *cestuis,* may buy stock owned by a third person in the same corporation with his own money, not that of the trust estate, for his individual account.

3. Whether the courts at the suit of a *cestui* may control, as to investments, the discretion of a trustee who, by the will of the trustor, was given the broadest possible powers and discretion as to investments and reinvestments for *cestuis.*

4. Whether a trustee, being the executor of an estate, the beneficiaries of which are the widow and children of the decedent, and who is trustee of a separate estate set up by the will for each of the four children, and who owns individually the same number of shares of stock in the corporation as are owned collectively by the widow and the four children (his *cestuis,* must, if he buys at all, buy the stock held by a third person in the same corporation, ratably for

himself, the widow and his *cestuis*, the trustee holding no other relationship of trust to the widow than as said executor and as president and manager of the corporation of which she is also a director.

5. Whether, after the time limited for the closing of an estate, an executor, still having funds in his hands distributable to the widow of the decedent and to her children for whom he is trustee, shall be compelled to invest funds of the estate.

6. Whether after the time limited by the will for the closing of the estate, an executor, having broad powers of investment during the time limited for the closing of the estate, and still having funds of the estate in hand, should be compelled at the suit of the trustor's widow, a distributee of the estate, to make investments for her.

Statement

The cases shown in the caption were consolidated for trial in the District Court of New Mexico and were likewise consolidated on appeal to the Circuit Court of Appeals, Tenth Circuit.

Vendla E. Wootten had filed in her individual capacity a suit in the District Court against John B. Wootten and John B. Wootten as trustee under the Last Will and Testament of R. K. Wootten, deceased. As next friend for each of her four children, the *cestuis*, said Vendla E. Wootten filed a suit. After the consolidation of two of the cases for trial, by stipulation three of the suits remain on the docket of the District Court to abide the final result of the two cases consolidated and tried.

Motions to dismiss were sustained and an appeal was prosecuted to the Circuit Court of Appeals, Tenth Circuit, with the resulting decision, reversing the judgments of the

lower court and remanding the cases for trial on the merits (R. 1 at 73, 74) (and 151 F. (2d) 147).

After trial of the consolidated actions upon the merits, and under the law pronounced on the first appeal, judgments were entered for the defendant and an appeal was taken by plaintiffs to the Circuit Court of Appeals, with the resulting final judgment being entered there on January 25, 1947, (R. 2 at 328).

The cases involve the purchase of stock owned by a third person and in no way connected with any trust estate or with the estate of R. K. Wootten, deceased. Defendant was executor of the estate of his deceased brother, R. K. Wootten, by will. The time limited for closing the estate was five years. After the expiration of said five year period, defendant bought stock with his own money from one W. R. Ferguson, who held it subject to sale to any willing purchaser. At the time, Vendla E. Wootten, widow of R. K. Wootten, deceased, owned stock in the same corporation, and defendant was the owner of stock therein and the holder of stock therein for each of his *cestuis*.

Each of the suits was instituted on the theory that defendant should be held to hold the stock purchased from Ferguson burdened with a constructive trust for the plaintiffs ratably to the extent of one-half of the number of shares purchased.

The lower court, upon motion, dismissed the suits, holding that defendant had a right to make the purchase. The Circuit Court of Appeals reversed the holding that the defendant held the stock as constructive trustee, unless he could show that in making the purchase he acted in good faith and with loyalty to the widow and his *cestuis*.

On the trial upon the merits, the District Court held that the defendant had met the requirements of law and had acted in good faith and with full loyalty to all plaintiffs. Again, the Circuit Court of Appeals reversed, holding that

under the law as announced on the first appeal and upon the facts at the second trial, defendant had failed in his duties to both the widow and his *cestuis*, and that the stock purchased from Ferguson is held by him burdened with a constructive trust in behalf of both the widow and the defendant's *cestuis*.

To save repetition, a further statement of facts involved is reserved to be made in the brief supporting this petition.

Reasons for Granting the Petition

I

The decision of the Circuit Court of Appeals, as stated under the Basis of Jurisdiction, is in conflict as to the same matter with the decisions of the Circuit Court of Appeals of the First Circuit in *Donnelly* v. *Consolidated Trust, et al.*, 99 F. (2d) 185, and is in conflict as to the same matters with the decision of the Circuit Court of Appeals of the Second Circuit in *Prudential Ins. Co. of America* v. *Liberdar Holding Corporation*, 72 F. (2d) 395.

II

The decision of the Circuit Court of Appeals is final regardless of errors committed, if any, unless consideration is given to the case by this Court.

III

The Circuit Court of Appeals is in error, it is respectfully submitted, in the following particulars:

(1) In holding that a beneficiary of a trust estate, composed in part of corporate stock, a portion of which stock is owned by the trustee individually and a part by the beneficiary but held by the trustee, can object to the purchase on the open market by the trustee individually of stock in the same corporation;

(2) In holding that a trustee individually owning stock in a corporation and holding stock in the same corporation for the *cestuis* and having the widest possible discretion in the matter of investment of the funds belonging to his *cestuis*, may not buy, with his own money and for his individual account, stock owned by a third person in the same corporation;

(3) In holding that the courts at the suit of a *cestui* may control, as to investments, the discretion of a trustee who, by the will of a trustor, was given the broadest possible powers and discretion as to investments and reinvestment for his *cestuis;*

(4) In holding that a trustee, being the executor of an estate, the beneficiaries of which are the widow and children of the decedent, and who is trustee of a separate estate set up by the will for each of the four children, and who owns individually the same number of shares of stock in the corporation as are owned collectively by the widow and the four children, his *cestuis*, must, if he buys at all, buy the stock held by a third person in the same corporation ratably for himself, the widow and his *cestuis*, the trustee holding no other relationship of trust to the widow than as executor and as president and manager of the corporation, of which she is also a director;

(5) In holding that after the time limited for the closing of an estate, an executor still having funds in his hands distributable to the widow of the decedent and to her children for whom he is trustee, shall be compelled to invest funds of the estate;

(6) In holding that after the time limited by the will for the closing of the estate, an executor, having broad powers of investment during the time limited for the closing of the estate, and still having funds of the estate in hand, should

be compelled at the suit of the trustor's widow, a distributee of the estate, to make investment for her.

IV

The decisions of the Circuit Court of Appeals in the instant causes are of great public importance, involving, as they do, the rights, duties and obligations of trustees; and of the individual acting as trustee, in the matter of investment of his individual funds in property, corporate stock, not a part of the trust *res;* and involving also the extent of control by the *cestui* and the courts of the discretion granted by a trustor to the trustee.

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari to review the final judgment of the Circuit Court of Appeals of the Tenth Circuit should be granted.

JOHN B. WOOTTEN, and
JOHN B. WOOTTEN,
As Trustee under the Last Will and Testament of R. K. Wootten, Deceased, Petitioner,
By JOHN E. LYLE, JR.,
A. M. FERNANDEZ,
Attorneys for Petitioner.

H. A. KIKER,
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Santa Fe, New Mexico,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1278 and 1279

JOHN B. WOOTTEN; AND JOHN B. WOOTTEN, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF R. K. WOOTTEN, DECEASED,

Petitioner,

vs.

CARL EKLUND WOOTTEN, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND VENDLA E. WOOTTEN;

AND

JOHN B. WOOTTEN; AND JOHN B. WOOTTEN, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF R. K. WOOTTEN, DECEASED,

Petitioner,

vs.

VENDLA E. WOOTTEN

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I

Judgments & Decisions

The final judgments appealed from appear at R. 2 at 328. The majority opinion, with Judge Phillips writing and Judge Murrah concurring, begins at R. 2 at 311. The opinion of Judge Huxman dissenting begins at R. 2 at 326. These opinions are reported in 159 F. (2d) 567.

The judgments on the first appeal appear at R. 1 at 73 and 74. The opinion of the majority on the first appeal establishing the law of the case for the District and the Circuit Courts, Judge Phillips writing and Judge Murrah concurring, begins at R. 1 at 61. The opinion of Judge Huxman dissenting, on the first appeal, begins at R. 1 at 67. These opinions of the Circuit Court of Appeals on the first appeal are reported in 151 F. (2d) 147.

II

Jurisdiction

The basis upon which it is claimed that the Supreme Court should give consideration to these cases is set out in the Petition for Certiorari.

III

The Facts

The facts found in the District Court at the trial upon the merits appear at R. 2, 53 to 63. Briefly stated, the facts so found are as follows:

On July 30, 1936, defendant purchased from his brother an undivided one-half interest in certain ranch properties and on the same day the two brothers entered into a contract with a third person to manage said properties for a period of 6 years beginning January 1, 1936, seven months prior to the purchase by defendant and the making of the written contract with the manager, one W. R. Ferguson. The contract provided that if the manager should earn a profit of 100% during the 6 year period, after payment of expenses, including salary of $100.00 per month for the manager and 5% interest annually on the total investment of the brothers, the manager should have, at the expiration

of the term, a one-third undivided interest in all ranch properties (R. 2, 53, 54).

Defendant's brother died testate leaving his widow and four children him surviving. His will appointed defendant as executor and provided that the estate should be closed not later than five years from the date of the death of the testator (R. 2, 21). The will gave the decedent's properties, one-fifth to the widow and four-fifths to the defendant as trustee for the children, each child to be the beneficiary of a trust separate from that of all others, amounting to one-fifth of the entire estate (R. 2, 21). A portion of decedent's estate was his interest in the ranch.

In addition to the trust set up by decedent for each of his children, defendant was trustee of 15 other trusts, each being separate from the others, set up by the paternal grandparents of the children (R. 2, 54, par. 7).

After two years after the death of R. K. Wootten, deceased, a corporation was organized by agreement of defendant, the plaintiff Vendla E. Wootten and W. R. Ferguson, acting upon legal advice of an attorney in Oklahoma who represented defendant in the matter of the estate of R. K. Wootten, deceased, in Oklahoma, and who had represented members of the Wootten family for many years (R. 2, 56, par. 12). It was agreed that the value of the property at that time required the issuance of 1830 shares of stock of the par value of $100.00. One-third of the stock was issued to John B. Wootten, individually, one share was issued to W. R. Ferguson, and one-third of the stock was issued in equal parts to the plaintiff Vendla E. Wootten and the four children, defendant as trustee taking the stock for the children. 609 shares were held to await the determination of W. R. Ferguson's interest at the expiration of the 6-year term (R. 2, 57, par. 13).

After the expiration of the 6-year term, the interest of said Ferguson was determined by judgment of a State court

in New Mexico, and Ferguson became the owner of 570 shares of the stock of said corporation, the remainder of 610 shares, one-third of the total issued, being ratably distributed to defendant individually and to Vendla E. Wootten and said children, the trustee taking for the children (R. 2, 57, par. 14).

A little more than a year after the issuance of the stock to Ferguson, John B. Wootten, with his own money and for his own account, bought all of the stock issued to Ferguson except 34 shares then and now owned and held by an assignee of Ferguson (R. 2, 59, par. 21).

During the time intervening between the delivery to Ferguson of his stock and the month of January, 1944, defendant and Vendla E. Wootten discussed the possible purchase of the Ferguson stock, and said Mrs. Wootten stated that she would not be interested in purchasing any of the Ferguson stock, and agreed with defendant that funds of the children should not be so invested (R. 2, 58, par. 19). At the time of the purchase of the 536 shares of stock by defendant, said Vendla E. Wootten was present and stated that she did not care to buy any of the stock. No funds of the estate of R. K. Wootten, deceased, or of Vendla E. Wootten, or of any beneficiary of any of said trusts, were used in making said purchase (R. 2, 39).

On the date when defendant purchased the Ferguson stock, he delivered to the plaintiff Vendla E. Wootten, from the Estate of R. K. Wootten, deceased, a sum of money in excess of $10,000.00 (R. 2, 59).

Said R. K. Wootten died testate on the 2nd day of January, 1938, being a resident of Grady County, Oklahoma, in which county probate proceedings were had, and at the time of trial had been concluded; and ancillary proceedings were had and concluded in Colfax County, New Mexico (R. 2, 54, par. 4).

The purchase of the stock by defendant from Ferguson was more than six years after the death of R. K. Wootten, deceased.

In handling monies and property of his *cestuis*, defendant never bought any unlisted stocks, but made many investments in listed stocks for each of said children, and has so managed the affairs of said children that each, by reason of investments by him made and by reason of the advance in value of stocks and other properties, is now worth approximately double the amount of the worth at the time defendant assumed his duties as trustee (R. 2, 59, par. 23). In handling the monies of two of his *cestuis*, they being girls, Gerda Corrine Wootten and Vendla Wootten, defendant bought annuities, so that each, beginning at the age of 32, would have an income of approximately $150.00 per month for life. This was done by written agreement of the plaintiff Vendla E. Wootten, and also in the case of Gerda Corrine by her own written agreement (R. 2, 60). In buying listed stocks only, defendant followed the advice of counsel (R. 2, 159).

After the purchase of the stock by defendant from Ferguson, the plaintiff Vendla E. Wootten wrote to defendant stating that she wished to change her mind about buying the said Ferguson's stock and—that he issue to her a one-fifth part of one-half thereof, and to each of the children the same amount. Defendant replied saying that he would issue stock to said Vendla E. Wootten and also to Richard Kelly Wootten, one of the *cestuis*, who was getting old enough to make some decisions for himself, if they cared for it, but that he would not buy for the younger children (R. 2, 60).

Some time later these suits were instituted, Mrs. Wootten suing for herself and as next friend for the two children who were still minors, and the other *cestuis* having passed the age of 21 years sued each separately for himself (R. 2,

60, par. 25). Neither the actual nor the market value of the stock was established; there was no probable market for the sale of any part of the stock except to some member of the Wootten family, all of said stock except 34 shares being owned by members of the Wootten family (R. 2, 62, par. 29).

Defendant has never occupied any fiduciary capacity with respect to Vendla E. Wootten except as executor of the will of R. K. Wootten, deceased, and except as an officer of the Red River Ranch, Inc.; and said Vendla E. Wootten has been a director of the Red River Ranch, Inc., since its organization and has attended both stockholders' and directors' meetings (R. 2, 62, par. 32, 33), where all reports on the corporate affairs were available to her and explained in open meeting (R. 2, 94, 174).

In his dissenting opinion on the second appeal, Judge Huxman of the Circuit Court said of both the findings and conclusions of the trial court who had heard the witnesses and observed their demeanor while testifying:

> "I fully concur in the findings of fact and conclusions of law of the learned trial court, and therefore am unable to concur in the majority opinion . . ." (R. 2, 326).

Judge Huxman had dissented upon the first appeal, being of the belief that the lower court was correct in holding that the complaints did not set forth facts upon which relief could be granted.

Judge Phillips in his opinion on the second appeal stated facts held by him, with Judge Murrah concurring, sufficient to show want of good faith on the part of defendant as trustee, under the application of the law declared by the majority on the first opinion (R. 2, 311-326).

Distinguished and learned jurists who have considered the law and the facts of the case are thus shown to be in conflict of opinion as to both the law and the facts, with the

majority of the Circuit Court, it is true, holding against petitioners as to both law and facts.

IV

ARGUMENT

As a basis for our request that this Court should consider this case, we have first suggested that there is a conflict of opinion between two or more of the Circuit Courts of Appeals as to the same matter.

In the first opinion (R. 1, 61, at 65), Judge Phillips stated the standard by which the conduct of a trustee is to be governed in part in the following words:

> "The standards of conduct for a trustee rise far above the ordinary morals of the market place. Not honesty alone but a punctilio of honor the most sensitive is the standard of behavior required of a trustee."

Almost the exact words used by Judge Phillips were written by then Chief Justice Cardozo of the Court of Appeals of New York in *Meinhard* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1, when he said:

> "Many forms of conduct permissible in workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

In such cases as that being considered by Mr. Justice Cardozo, the language used by him was most highly appropriate. In the case being considered by him, there was actual dealing by one of two co-adventurers with the very property in which both were interested. Under such circumstances, we think the courts have never failed to require such standards of conduct of one occupying a fiduciary rela-

tionship to another. The requirement, we agree, is, and should be, applicable in such cases, and in such only, as the dealings of the trustee are actually with property held in trust or so connected therewith that the *cestui* is or may be prejudiced or injured in his property rights by the trustee's action.

The effect of the decisions in the instant cases is to establish the following general propositions of law which, it is respectfully submitted, are erroneous:

I. A beneficiary of a trust estate composed in part of corporate stock, a portion of which stock is owned by the trustee individually and a part by the beneficiary but held by the trustee, can object to the purchase on the open market by a trustee individually of stock in the same corporation.

The proposition just stated is in direct conflict, it is submitted, with the law announced in *Donnelly* v. *Consolidated Investment Trust, et al.*, 99 F. (2d) 185. The matter in both cases is the same.

In the *Donnelly* case, the trustees owned stock, as did also those to whom they bore trust relationship. The trustees bought sufficient stock on the open market to give them control.

The court held that the disability of the trustee is against profiting personally at the expense of the trust. In the opinion, the court said:

> "*A trustee may not legally take or hold any interest or position in conflict with the trusts which he has undertaken, nor may he make a personal profit out of transactions made on account of the trust.* Familiar examples of this are buying from or selling to the trust by a trustee in such a way that he makes a profit directly or indirectly. *Jackson v. Smith*, 254 U. S. 586, 41 S. Ct. 200, 65 L. Ed. 418. *This principle, on which the appellant relies, has no application in the present*

case. The trust was not a party to the contracts by which Dumaine and Winsor acquired their stock; nor was it affected by these transactions except that one shareholder was substituted for another. The only persons affected by such contracts were the parties to them. Dumaine's and Winsor's purchases of Amoskeag shares did not in the least affect Donnelly's interest as a shareholder; the number of shares was not altered nor the amount payable on each share, and it did not matter to him who the other owners of shares were. The purchases were not as he contends utterly illegal and void; no authority is cited in support of this position, and we are aware of none. *The disability of a trustee is against profiting personally at the expense of his trust; and this disability will be rigidly enforced. Nothing of that sort occurred here as to Donnelly. Whether there was improper profiting on the part of Dumaine and Winsor at the expense of the shareholders who sold to them is a distinctly different question, not presented by this appeal, on which the complete facts are not before us, and on which we express no opinion.''* (Italics supplied.)

In the instant cases, petitioner, the trustee, occupies exactly the same position as did the trustees in the *Donnelly* case. The *cestuis* here occupy exactly the same position as did Donnelly in his case.

In both cases, the purchase of stock from third parties was sufficient to give control.

In neither the *Donnelly* case nor in the instant cases did the trustee profit at the expense of the trust.

The matter involved in the *Donnelly* case and in the instant cases is the purchase of corporate stock from third parties or on the open market, with individual funds of trustees and not with trust funds.

In neither of the cases was the trust property involved.

The conflict between the opinions in the cases seems apparent.

II. A trustee individually owning stock in a corporation and holding stock in the same corporation for his cestuis, and having the widest possible discretion in the matter of investment of the funds belonging to his cestuis, may not buy stock owned by a third person in the same corporation for himself individually.

The proposition stated is erroneous, we submit.

The proposition is also, we think, in conflict with the decision in *Prudential Insurance Co.* v. *Liberdar Holding Corporation*, 72 F. (2d) 395.

In the *Prudential* case just cited, those acting as fiduciaries had broad discretionary powers.

The property purchased was an equity held to be junior to certain outstanding mortgages held in trust. In the case the court stated:

> "Of course a trustee may not buy in the trust estate to his own advantage; it is not necessary to labor that doctrine which is settled by multitudinous decisions. There is however no more objection to a trustee's buying an interest junior to the trust estate than to his buying any other property; such a purchase cannot possibly create an interest adverse to the *cestui que* trust."

It would seem that if a trustee may buy an interest junior to that of the trust estate, there would be no possible objections to a trustee, owning stock in a corporation in which a *cestui* also owns stock held by the trustee, buying additional stock on the open market for himself individually. By the purchase of the Ferguson stock no interest adverse to that of the *cestuis* was created.

The conduct of the trustee in the instant cases has never been questioned except as to the purchase of the Ferguson stock. (R. 2, 326). No valid basis appears therefor, to have

distinguished the instant cases from *Prudential* v. *Liberdar, supra.*

III. The courts, at the suit of a cestui, may control, as to investments, the discretion of a trustee who, by the will of the settlor, was given the broadest possible powers and discretion as to investments and reinvestments for the cestuis.

The widow, Mrs. Vendla E. Wootten, by the suits brought by her as next friend for her minor children, has asserted that it is her opinion that one-half of the Ferguson stock should have been purchased ratably for herself and for the *cestuis.* Mrs. Wootten had declined the offer of the trustee to deliver to her the portion of the stock which she contends she should have, unless the trustee would also deliver to each the *cestuis* a like portion of the Ferguson stock. Mrs. Wootten insisted, before suits were brought, upon controlling the discretion of the trustee; and sued to compel the trustee to deliver that which she might have had without suit.

The trustee was given the broadest possible power by the will of his deceased brother (R. 2, 20). The trustee, having this power, decided in the exercise of his discretion that he should not buy any part of the Ferguson stock for his *cestuis.*

The trustee gave what the trial judge and the one dissenting judge of the Circuit Court of Appeals considered not only adequate but compelling reasons for his decision not to buy for the beneficiaries (R. 2-203-63 and R. 2, 326).

The opinion of the majority in the Circuit Court of Appeals has in fact substituted the judgment and discretion of the beneficiaries for the judgment and discretion of the trustee. That this is contrary to the intent and wishes of the trustor is obvious. If R. K. Wootten Sr., the testator,

had desired or intended to invest Mrs. Wootten, his widow, or R. K. Wootten Jr., his son, with discretionary power as to investing funds of the several trust estates, he could have, and doubtless would have, so provided in his will. He did provide that R. K. Wootten Jr., should have his property delivered to him so that he might fully control it, and the investment of it, when he should arrive at the age of 25 years (R. 2, 21, par. 8).

IV. A trustee, being the executor of an estate, the beneficiaries of which are the widow and children of the decedent, and who is trustee of a separate estate set up by the will for each of the four children, and who owns individually the same number of shares of stock in the corporation as are owned collectively by the widow and the four children, his cestuis, must, if he buys at all, buy the stock held by a third person in the same corporation, ratably for himself, the widow and his cestuis, the trustee holding no other relationship of trust to the widow than as said executor and as president and manager of the corporation of which she is also a director.

In the majority opinion, this is found:

> "Moreover, the problem presented to John B. Wootten, as trustee, with respect to the purchase of the Ferguson stock, was not simply whether he should make an original investment of trust funds in the stock of the corporation, but whether he should purchase one-malf of the Ferguson stock for Vendla E. Wootten, and the children, and thus protect the investments he had theretofore made for them through keeping equal the amount of stock owned by the two families."

The trustee individually owned 630 shares of stock in the corporation, before the Ferguson purchase, and Mrs. Wootten owned 126 shares, and the trustee held 604 shares for his *cestuis*. The entire outstanding stock was then 1830 shares,

so the trustee had control of the corporation. He had control of all of the stock except the Ferguson stock and that owned by Mrs. Vendla E. Wootten from the beginning (R. 2, 31 & 315).

If the trustee had bought ratably for himself, Mrs. Wootten and the *cestuis*, he then would have owned 898 shares and each of the others would have owned 179.6 shares. The youngest child, Carl Eklund Wootten, was 8 years of age at the time the judgment of the District Court was entered (R. 2, 54). So, in that event, petitioner, continuing as trustee, would have been able to vote on his own account and that of the youngest of the children 1077.6 shares; and would have had control of the corporation during the 17 years following the date of the judgment of the District Court. It would appear that the matter of voting control is of no great importance, at least until the lapse of about 16 years from the present date. At that time, or in case of the trustee's resignation, the third party owning 34 shares would have the controlling vote whenever petitioner would take a position as to management and Mrs. Wootten and her children should oppose him.

The majority opinion states that authority supports the proposition that the President and General Manager of the corporation occupies a fiduciary relationship to other stockholders. This being true, petitioner, as long as he is the managing officer of the corporation, will have a fiduciary relationship to other stockholders; and will be liable as such fiduciary for any abuse of the power exercised by him as managing officer of the corporation.

There is no suggestion in the pleadings or in the facts of the case that petitioner has violated any duty as such fiduciary, unless it is the law that a president and managing officer of a corporation cannot for his own account buy additional stock in the corporation of which he is an officer. We have failed to find any authority so holding.

Mrs. Wootten, the widow, before the purchase of the Ferguson stock had stated she did not care to make further investment in the stock of the corporation for the reason that she was afraid of what might happen to her investment in the ranch if the trustee should become unable to operate it (R. 2, 89). It is held in *Anderson* v. *Bean*, 272 Mass. 43, 172 N.E. 647, that:

> "The disturbance of the equal balance of holdings of stock by the trust and by the trustee as an individual is not as a matter of law, apart from other considerations, unconscionably advantageous or disadvantageous. Mere equality of holding of stock between two hostile interests does not insure tranquility of corporate management."

If your petitioner could not buy the Ferguson stock because he would thereby acquire control of the corporation, then he could not have sold the stock owned by him to Ferguson, because thereby he would have passed control to Ferguson; and in the case of either sale, the *cestuis* and Mrs. Wootten would have held the minority of stock.

The petitioner, under the opinion of the Circuit Court of Appeals, owns stock in the corporation which he can neither sell nor increase by buying the 34 shares now owned by a third party.

In *Levi* v. *Evans, et al.* (C. C. A. 7), 57 F. 677, at 685, the court held that a trustee might sell his own stock while holding stock for others as trustee, it not appearing that his so doing in any way prevented the sale of stock held in trust. The holding that the trustee could not buy the Ferguson stock must mean that he could not have sold his stock to Ferguson, and so the holding in that particular is in conflict with *Levi* v. *Evans*, just cited. Petitioner has invested extensively for himself and for the *cestuis* in stocks in other corporations (R. 2, 241, 258). Can he now buy other

stock, or sell his holdings, without also buying or selling for his *cestuis?*

The position in which the present decision of the Circuit Court of Appeals places the trustee is one of uncertainty. He cannot know how much of the power given to him by the testator he will be allowed to exercise.

V. After the time limited for closing of an estate, an executor, still having funds in his hands distributable to the widow of the decedent and to her children for whom he is trustee, shall be compelled to invest funds of the estate.

Testator's will gave petitioner broad power of control of the estate during a 5 year period from the death of the testator, which time was limited for the closing of the estate. As to investments for the estate, the will provided:

> "and he is expressly authorized and empowered to invest and reinvest any and all money coming into his possession in such security, and upon such terms and conditions, as he may determine in the exercise of his judgment and discretion" (R. 2, 20).

Next, the will provided that after payment of debts, taxes and administration expenses, the executor should distribute to the plaintiff Vendla E. Wootten her share of the estate "which she shall take absolute" (R. 2, 20). In the same paragraph of the will directing distribution to plaintiff Mrs. Wootten, the will directed that:

> "All distributions made under this paragraph of this will by the executor shall be made either in money or property in kind. Final distribution under this paragraph shall be made within 5 years from the date of my death, and administration of my estate closed, but the trustee shall administer the trusts as provided in this instrument" (R. 2, 20-21).

The trusts referred to were those provided for the children.

The widow was given no power to direct or control the discretion of the executor as to investment.

Testator died January 2, 1938 (R. 2, 54). The estate was limited to be closed, therefore, on January 3, 1943. After that date, the executor had no power of investment. It was his duty to marshall the assets of the estate, pay the debts and make distribution of the remainder pursuant to the directions of the will.

The estate could not be closed on the date so limited because there was some difficulty in getting transfers of certain stocks entered on the books of the companies which had issued them (R. 2, 161).

The majority opinion holds that under the will petitioner "clearly had the power to purchase one half of the Ferguson stock for the estate of R. K. Wootten and to distribute it to Vendla E. Wootten and to the children's trusts in equal shares."

The date of the purchase was one year and 12 days after the date set by the testator for closing the estate.

It is respectfully submitted that if the executor had made any investments, after the date set for closing the estate, he would have incurred liability on account thereof in case of loss therefrom.

Not only was he lacking in power, we submit, under the terms of the will; but he was lacking in power to make the investments spoken of in the opinion from the funds of the estate for the reason that Mrs. Wootten, then entitled to distribution, had declared on numerous occasions, including the day of the purchase of the stock, her desire not to have her funds invested in the purchase of the Ferguson stock (R. 2, 116, 117, 190, 226). Though the executor's power was broad and unhampered during the 5 year period, he

surely had no right to invest money which was then distributable to her, after the expiration of the 5 year period, against the will and wishes of Mrs. Wootten.

VI. After the time limited by a will for the closing of an estate, an executor, having broad powers of investment during the time limited for the closing of the estate, and still having funds of the estate in hand, may be compelled at the suit of the testator's widow, a distributee of the estate, to make investments for her.

The position of Vendla E. Wootten, plaintiff, under the facts of her case, it is submitted, is highly untenable.

As previously pointed out, she had told the executor she did not want further investment in the ranch or its stock. She not only so told him, but she made the same statement to others (R. 2, 190).

At the time of the purchase of the Ferguson stock, when the executor had no further powers or duties under the will than to close the estate as speedily as possible and distribute its assets, it would seem that he should have made no investments of the funds of the estate. It would seem clear that he would have incurred liability to the plaintiff, Mrs. Wootten, one of the distributees, if he had made investments of the estate funds after she had told him that she did not want any further funds of hers invested in the stock of the corporation. That she had so told petitioner is not only supported by all the testimony to the point, but it is clearly established in the letter written by her to petitioner on March 6, 1944 (R. 2, 226), in which she said, among other things:

> "We talked things over and if it is agreeable with you, and I have the privilege to change my mind, and you are going to let each one buy some of Mr. Fer-

> guson's stock—I would like to buy my share—along with the children and you."

This letter was written nearly two months after petitioner had purchased the stock. In answer to that letter, petitioner wrote to Mrs. Wootten a letter (R. 2, 221), in which he said, among other things:

> "I am perfectly willing to turn to you and R. K. some of the stock if you want it, although it is not my judgment, and I am not going to take any for the rest of the kids."

In the same letter, after giving reasons for not buying for the *cestuis*, petitioner again said, referring to the ranch and the Ferguson stock:

> "It is a closed proposition, with very few buyers. As I say, though, if you want to, and I guess R. K. is old enough to start making some of his own decisions, I am agreeable. Just tell me what you want to do."

In her testimony at R. 2, 118, Mrs. Wootten admitted that petitioner had offered to let her have stock, and had made the same offer to R. K. Wootten Jr. She was then asked why she did not take the stock instead of suing for it, and she answered: "Because I wanted share and share alike for the four children and myself . . ."

As far as we have been able to find, Mrs. Wootten is the first plaintiff in Anglo-American legal history who ever sued and obtained judgment for that which she might have freely taken without suit.

It is not surprising that the trial judge said of the widow's case, "I do not see how that case got here" (R. 2, 203).

If Mrs. Wootten can recover, then she recovers because of a right, somehow existing, to enlarge the time granted by

the testator for the making of investments by the executor. When the testator said the estate should be closed not later than 5 years from the date of his death, he surely intended that all powers of the executor as such, except the power to distribute the assets of the estate and to close it, should cease 5 years from the date of his death.

The Decisions in the Instant Cases Are of Great Public Importance

The decisions in the instant cases are of great importance to trustees and *cestuis* alike throughout the country, because there is scarcely a village or a hamlet anywhere in the country in which some persons are not acting as trustees and some others receiving funds from trustees. In all cases in which trustees have power of investment, the decisions in these cases are highly important. In every case in which any trustee, vested with broad discretion in the matter of investments, holds stock in corporations in which his *cestuis* also own stock, the decisions must be considered as a guide to the conduct of the trustees. High as have always been the duties of trustees to their *cestuis* in the matter of loyalty, and well recognized as those duties have been established in previous decisions, it would seem to be a matter of extreme importance to the public generally to have it definitely established now as matter of law whether a trustee may, with his own funds and on his own account, make investments in corporate stock in which his *cestuis* also own stock, and which investments do not in any way impair the value of the holdings of the *cestuis* or cause any expense to the *cestuis*. It is submitted in the case at bar, and in all other cases involving such situations as those existing in the case at bar, the decisions in the instant cases leave trustees in a position of uncertainty and of extreme doubt as to their

powers; and make it impossible for trustees in petitioner's situation to understand and appreciate the nature and extent of the powers granted by the settlor of the trusts.

Respectfully submitted,

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